SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. SHANNON BLAKE, Petitioner.	No. 96873-0 COA 35601-9-III STATE'S MOTION TO RECONSIDER OPINION FILED FEBRUARY 25, 2021

I. IDENTITY OF MOVING PARTY AND STATEMENT OF RELIEF SOUGHT

Respondent, the State of Washington respectfully asks this Court to reconsider its decision in *State v. Blake*, No. 96873-0, filed on February 25, 2021.

II. FACTS RELEVANT TO MOTION

Shannon Blake was found guilty of possession of a controlled substance after a bench trial. *State v. Blake*, 7 Wn. App. 2d 1025 (2019) (unpublished, cited for context only pursuant to GR 14.1). The trial court, finding her not credible, ruled that Ms. Blake did not meet her burden to

prove the affirmative defense of unwitting possession. *Id*. at 1. Ms. Blake's direct appeal argued that placing the burden on a defendant to prove unwitting possession violated the presumption of innocence by shifting the burden of proof to the defendant. *See id*. at 2-3. The Court of Appeals rejected that argument. *Id*. at 3.

Ms. Blake petitioned for review, seeking review of whether Washington's possession of a controlled substance statutory scheme under RCW 69.50.4013 violated the presumption of innocence, and urged this Court to overrule its prior holdings that the Legislature intentionally defined possession of a controlled substance as a strict liability crime. Pet. for Rev. at 1-2.

This Court reversed Ms. Blake's conviction, with five Justices holding that legislative police power does not extend to criminalizing innocent and passive conduct. *State v. Blake*, ___ Wn.2d ___, slip op. at 30. Justice Stephens filed a concurring opinion which reasoned that the remedy should be to overrule the relevant prior decisions from this Court and read an intent requirement into RCW 69.50.4013. *Blake*, slip op. at 29 (Stephens, J., concurring). Three justices dissented, reasoning that

legislative power included the power to enact strict liability crimes. *Blake*, slip op. at 2-3 (Johnson, J., dissenting).

III. GROUNDS FOR RELIEF AND ARGUMENT

A party may file a motion for reconsideration of a decision terminating review within 20 days after the decision is filed, if the party contends that the court has overlooked or misapprehended facts or points of law. RAP 12.4(a), (b), (c).

The majority opinion decided *Blake* on constitutional grounds, reasoning it lacked the ability to reinterpret RCW 69.50.4013 to include a mens rea, in part due to the doctrine of legislative acquiescence; Justice Stephens pointed out that the doctrine of constitutional avoidance counseled against that approach. The majority acknowledged that, were this Court interpreting RCW 69.50.4013 for the first time, it would adopt the approach outlined in Justice Stephens' concurrence. *See* slip op. at 24 n.13. In choosing between these two paths, the majority suggested that this Court's inherent authority to overrule its own prior decisions is restricted by legislative inaction after this Court interprets a statute, a holding contrary to the doctrine of separation of powers. It is also unclear whether all members of this Court considered the very different consequences that flow

from each approach; particularly where parties have relied on this Court's prior decisions for forty years. No briefing was presented to this Court on the retroactive effect of the majority's decision. Additionally, this Court voided the possession of a controlled substance statute under a constitutional theory advanced by amici, rather than by Ms. Blake. For these reasons, the State respectfully requests this Court reconsider its decision and adopt the concurrence.

A. THE MAJORITY OPINION EXCEEDS THE SCOPE OF MS. BLAKE'S PETITION FOR REVIEW.

The concurrence posits that the majority opinion overlooked the party presentation principle, which cautions courts to decide questions actually presented and argued by the parties. *Blake*, slip op. at 22-23 (Stephens, J., concurring) (citing *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008), and *United States v. Sineneng-Smith*, ___ U.S. ___, 140 S. Ct. 1575, 1578, 206 L. Ed. 2d 866 (2020)).

Arguments raised only by amici need not be considered. *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (citing *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984); *Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 59-60,

586 P.2d 870 (1978); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962)). "This principle is especially applicable where … the issue being raised has not been adequately briefed." *Gonzalez*, 110 Wn.2d at 752 n.2.

By its own court rule and precedent, this Court will review only the questions raised in the request for discretionary review. RAP 13.7(b); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 692-93, 169 P.3d 14 (2007). "[T]he case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court." *Long*, 60 Wn.2d at 154 (internal citations omitted).

The State respectfully urges this Court to reconsider its decision in light of this principle. Ms. Blake's petition for review requested this Court to grant review based on its characterization of only two issues:

> 1. The presumption of innocence is a principle fundamental to America's history and tradition. "Freakish" criminal laws that eliminate traditional *mens rea* elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. Washington is *the only* state where possession of a controlled substance is a strict liability crime. The accused is presumed guilty unless he or she can prove "unwitting" possession. Does this presumption of guilt deprive defendants of their liberty without due process of law?
>
> 2. This Court has held that the possession of a controlled substance statute has no mental element and is a strict liability crime. But in interpreting the possession statute, this Court did not consider the foregoing constitutional issue, which seriously

> calls into question the constitutionality of the statute. Statutes are interpreted to avoid constitutional deficiencies. Should this Court overrule its holding that possession of a controlled substance is a strict liability crime without any *mens rea* element?

Pet. for Rev. at 1-2 (italics in original). Ms. Blake's petition expressly requested this Court grant review to determine whether Washington's possession statute violated due process by unconstitutionally shifting the burden to an accused to prove their innocence of the crime through a judicially created affirmative defense. Ms. Blake asked this Court to determine whether the statute created a burden-shifting scheme, and explicitly requested this Court to overrule *Cleppe*[1] and *Bradshaw*[2] pursuant to those concerns. Ms. Blake's argument briefly referenced "innocent behavior," but she made that reference to analogize her case to a federal case which had determined that the Arizona legislature had unconstitutionally shifted a traditional and essential element of a criminal statute to an affirmative defense. Pet. for Rev. at 9-10 (citing *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz 2017)). Notably, *May* was overruled in part

[1] *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981).

[2] *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004). *Bradshaw* specifically addressed the burden-shifting issue raised by the petition. *Id*. at 537-39.

while this case was pending review. *See May v. Ryan*, 766 Fed. Appx. 505 (9th Cir. 2019). Ms. Blake's petition did not ask this Court to declare that the State's plenary police power does not extend to proscribing passive conduct. Her supplemental briefing was consistent with her petition's request of this Court to review the *burden shifting* aspect of the statute. *See* Pet'r Supp. Br. at 11-12.

The majority opinion addressed Ms. Blake's request to review whether the statute's potential burden shifting aspect violated due process, and concluded the affirmative defense does not negate an element of the crime, saving the statute and defense from the due process challenge. *Blake*, slip op. at 20-21. The majority opinion then asserted that the question it *would* answer is whether the Legislature may constitutionally penalize passive, unknowing drug possession with no mens rea element. The majority explained that amici had "more fully" briefed Ms. Blake's issue presented, but the State respectfully submits that the only constitutional issue ever directly raised by Ms. Blake was whether the statutory scheme unconstitutionally shifted the burden of proof and violated the presumption of innocence. *Blake*, slip op. at 6 n.3.

A panel of this Court granted review of the issues raised in the petition. *State v. Blake*, 194 Wn.2d 1023, 456 P.3d 395 (2020). As Justice Madsen has observed, "[i]t is unfair, as well as in violation of our rules, to grant review on a limited issue, receive supplemental briefing only on that issue, and then address and decide an additional issue." *State v. Thompson*, 173 Wn.2d 865, 891 n.13, 271 P.3d 204 (2012) (Madsen, J., dissenting) (citing RAP 13.6, 13.7). Fair notice of the issues to be determined in a case is an intrinsic necessity of the justice system. Pursuant to the party presentation principle, and the reasoning as outlined in the concurring opinion, the State respectfully requests this Court reconsider its decision.

B. THE DECISION SHOULD BE APPLIED PROSPECTIVELY IN LIGHT OF DECADES OF REASONABLE RELIANCE.

Blake should be applied only prospectively in light of the reasonable reliance placed on this Court's prior decisional law. Just as the petition for review gives notice to the parties of the dimensions of review, this Court's prior decisions, under stare decisis, give legal guidance to all interested parties. Under the majority opinion, the decision will be fully retroactive, i.e. it will require dismissal of all past possession cases; it will likely require resentencing on thousands of cases where a simple possession offense was

counted toward an offender score as a prior conviction; and it will also likely require resentencing for the thousands of cases where a possession conviction prevented prior offenses from washing out. The impact on the administration of justice will be devastating, especially considering the enormous pandemic-caused delays already facing courts.

That said, retroactivity implicates more than resentencing or the vacation of convictions. For example: Many defendants charged with simple possession have opted to participate in Washington's popular therapeutic drug courts; resulting from *Blake*, funding for treatment and rehabilitation programs may disappear; more importantly, any defendant currently in a substance abuse treatment program pursuant to a therapeutic court could lose funding for treatment should their case be dismissed, reducing access to treatment and potential recovery from addiction. Also, full retroactivity may complicate negotiated and accepted plea bargains in which the parties resolved more serious charges with a plea to simple possession. In many cases, this likely permitted a defendant to avoid serving a significant period of time incarcerated.

Justice Stephens' rationale for construing a mental element in the possession statute would not necessarily be fully retroactive. Because *none*

of these issues were briefed by the parties it is unclear whether this Court was aware of the differing impacts of these two rationales. It is similarly unclear whether this difference would have mattered to any individual Justice in the majority. Finally, it is unclear whether this Court intends all of the consequences that likely flow retroactively from the majority opinion.

Assuming this Court adopts Justice Stephens' opinion as the majority opinion, *Blake* should be applied only prospectively in light of the reasonable reliance placed on this Court's prior decisional law. The rationale for prospective application of judicial rulings was described forty years ago in *State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963). It involved interpreting a constitutional provision. This Court explained:

> If rights have vested under a faulty rule, or a constitution misinterpreted, or a statute misconstrued, or where, as here, subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected… The courts can act to do that which ought to be done, free from the fear that the law itself is being undone.

Id. at 666. This Court also observed that the prospective overruling of precedent had been applied to both criminal and constitutional law, among others. *Id*. at 670-72.

Approximately three decades ago, this Court adopted the approach used by federal courts to limit retroactivity of new rules of criminal procedure and new constitutional rules. *See Matter of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992). *St. Pierre* adopted the United States Supreme Court's analysis in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). New procedural or constitutional rules for criminal prosecutions should be applied retroactively only to cases on direct review or otherwise not yet final. *Matter of St. Pierre*, 118 Wn.2d at 326 (citing *Teague*, 489 U.S. at 311).[3] A conviction is "final" if judgment has been rendered, appeal exhausted, and the time for petition for certiorari has elapsed. *Teague*, 489 U.S. at 295.

The *Teague*-bar does not apply to rulings that "place ... certain kinds of primary, private individual conduct beyond the power of the criminal law-making power to proscribe, ... or ... [that] requires the observance of procedures implicit in the concept of ordered liberty." *Matter of St. Pierre*, 118 Wn.2d at 326 (quoting *Teague*, 489 U.S. at 311). Were the majority to

[3] A "new rule" "breaks new ground or imposes a new obligation on the States or the Federal Government...To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (citations omitted).

adopt the concurring opinion, these exceptions to the *Teague*-bar may not necessarily apply. As discussed, Justice Stephens' opinion avoids the constitutional issue of burden-shifting presented by Ms. Blake by construing the statute to contain an implied mens rea element. Potentially, under *St. Pierre*, the *Blake* decision would apply to cases on direct appeal, but not to final convictions. As the Supreme Court recently observed, *Teague* applies only to procedural or constitutional questions, not statutory interpretations of the substantive criminal law. *Bousley v. United States*, 523 U.S. 614, 620-21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

Retroactive changes in the law alter the status quo and may disturb a party's reasonable reliance on what the law formerly said and may cause manifest injustices. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Parties and lower courts must rely on this Court's decisions. They should not be penalized for such reliance on this Court's past decisional authority. Prior to *Blake*, this Court had consistently held that Washington's prohibition on possession of a controlled substance was a strict liability offense. *See, e.g., Cleppe*, 96 Wn.2d 373; *Bradshaw*, 152 Wn.2d 528. Therefore, possession of a controlled substance without *mens rea* was the law because this Court's

decisions made it so. Those decisions announced a definitive rule of law binding on litigants, lower courts, and citizens throughout the State. In recognition of this reliance and as a matter of equity, the new *Blake* rule should be purely prospective.

Many state supreme courts have confronted the inequities that result from overruling a prior interpretation of a substantive criminal statute. These courts have recognized that prospective application of the new rule is most consistent with notions of fundamental fairness. There are numerous examples of such cases, some of which are discussed below.

When the Michigan Supreme Court eliminated its common law felony murder rule, the court held that "[t]his decision shall apply to all trials in progress and those occurring after the date of this opinion." *People v. Aaron*, 409 Mich. 672, 734, 299 N.W.2d 304 (1980). New Mexico has applied a similar rule. In *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993), the court reinterpreted a child abuse statute that had previously allowed convictions to be based on simple negligence rather than criminal negligence. Because the new decision overruled several prior decisions, the

court held that the new rule applied prospectively. *Santillanes*, 849 P.2d at 366-67. The court stated:

> Law enforcement officials in this State have relied on the civil negligence standard in the child abuse statute for at least fifteen years. Our appellate courts on several occasions have upheld such convictions and approved of the application of the tort negligence standard….
>
> …
>
> …[E]qual administration of justice and the integrity of the judicial process requires prospective application of the criminal negligence standard in the child abuse statute. To give our holding today retroactive effect would unduly burden the criminal justice system. It could reopen old wounds and create new scars for child abuse victims and their families, wounds that they may not have forgotten, but from which they may have healed and recovered.

Id. at 367; s*ee also Jackson v. State*, 122 N.M. 433, 925 P.2d 1195 (1966) (holding that new double jeopardy rule would be applied prospectively because "retroactive application of the rule … would unnecessarily diminish the expectations of finality so important to the rule of law").

Other state courts have applied a rule similar to *Teague*, 489 U.S. 288, holding that changes to a substantive criminal statute would apply retroactively only to cases on direct review or otherwise not yet final, and would not apply to cases on collateral review. *See, e.g., Freeman v. State*, 698 So.2d 810 (Fla. 1997) (new rule eliminating the crime of attempted felony

murder would apply to cases not yet final on appeal); *Walker v. State*, 715 So. 2d 1065 (Fla. Dist. Ct. App. 1998) (new rule abolishing attempted felony murder would apply to cases on direct review); *Commonwealth v. Carter*, 396 Mass. 234, 484 N.E.2d 1340 (1985) (new felony murder rule applied only to cases on direct review. if the issue was preserved at trial).

In the circumstances presented by this case, this Court should apply the new *Blake* rule in a purely prospective manner. Prospective application of the new rule would maintain respect for this Court's prior decisional law, would further the principle of stare decisis, and would prevent disruption of the administration of justice.

C. ALTHOUGH LEGISLATIVE ACQUIESENCE IS A STATUTORY CONSTRUCTION TOOL, THE MAJORITY'S RELIANCE ON THAT PRINCIPLE UNDERMINES SEPARATION OF POWERS.

The majority suggests that the doctrine of legislative acquiescence forbids this Court from overruling its prior interpretations of RCW 69.50.4013, and that the parties have not asked this Court to discontinue using the doctrine. *Blake*, slip op. at 24 n.13, 27. While this Court's unease about the propriety of the doctrine poses an interesting future question, the State urges this Court to consider its holding's implications for the separation of powers doctrine, which may have been overlooked.

Separation of powers creates a clear division of functions among each branch of government, and limits the ability of one branch to interfere with another. *In re Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 238, 552 P.2d 163 (1976). "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803); *see also* WA. CONST. art. IV, § 1. The legislature's function is to set policy and draft and enact law. *In re Estate of Hambleton*, 181 Wn.2d 802, 818, 335 P.3d 398 (2014). Regardless of this Court's view on the usefulness or propriety of legislative acquiescence as a tool of statutory interpretation,[4] the majority opinion declined to overrule *Cleppe* and *Bradshaw* by stating the doctrine forbids this Court from reinterpreting RCW 69.50.4013. *Blake*, slip op. 24 n.13. This reasoning treads on this Court's own inherent power to "say what the law is," if one accepts that legislative inaction forbids this Court from overruling its own precedent. The Court inherently possesses the power to overrule its own decisions and declare its own decisions incorrect and harmful. *See Greene v. Rothschild*, 68 Wn.2d 1, 6-10, 414 P.2d 1013 (1966) (in the

[4] To be sure, the State urged this Court to consider legislative acquiescence as one factor of statutory interpretation in its supplemental brief.

context of the law of the case doctrine). "Under the doctrine of stare decisis, the court is not obliged to perpetuate its own errors." *Id*. at 8. It stands to reason that if this Court cannot bind itself from overruling its prior decisions, then neither can legislative inaction. As mentioned, the majority agrees with the concurrence that *Bradshaw* and *Cleppe* are both incorrect and harmful. The State submits that construing legislative inaction as a limit of this Court's power, rather than as a factor to consider in statutory interpretation, undermines the separation of powers.

D. THE MAJORITY OPINION OVERLOOKS THE BURDEN OF PROOF THE PETITIONER MUST MEET TO DEMONSTRATE A STATUTE IS UNCONSTITUTIONAL.

This Court presumes statutes are constitutional, and the challenging party has the heavy burden of proving unconstitutionality beyond a reasonable doubt. *Island Cty. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). The majority opinion overlooks that burden.

The majority and concurring opinions both point to the example of *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012). In that case, the defendant was accused of committing the strict liability crime of third degree child rape, but claimed that some of her acts were involuntary because she was sleeping when they occurred. *Id*. at 728-30. This analogy

is useful; although involuntary conduct and passive conduct are not necessarily always the same, under the circumstances of the *Deer* case, Ms. Deer had a reasonable claim that being asleep during sexual intercourse was both passive and involuntary.

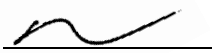
Both opinions appear to conclude that the case remains good law, which means the State *does* possess the power to proscribe some passive conduct, if one characterizes child rape committed while sleeping as passive conduct. *See Blake*, slip op. at 30 n.15 (majority opinion); slip op. at 26-27 (Stephens, J., concurring). *Deer* demonstrates that a prohibition on passive conduct is valid in some circumstances. Therefore, reasonable minds could differ on whether due process limits police power as the majority opinion holds. The State submits that this Court has overlooked whether Ms. Blake met her burden to demonstrate *beyond a reasonable doubt* that RCW 69.50.4013 violates due process in the manner the majority opinion holds, particularly where Ms. Blake failed to raise that argument. Because the opinion does not analyze Ms. Blake's burden of proof, it is unclear whether this Court considered it.

IV. CONCLUSION

The State respectfully requests this Court to consider whether the majority opinion answers the question actually presented by Ms. Blake. Similarly, the State urges this Court to consider the potentially overlooked doctrines of party presentation, separation of powers, and reasonable reliance. Interested parties have relied on this Court's prior decisions in this area for 40 years, and the majority opinion has far-reaching consequences. These doctrines warrant the majority to adopt the concurring opinion of Justice Stephens as the majority opinion.

Dated this 17 day of March, 2021.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brett Pearce #51819
Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 17, 2021, I e-mailed a copy of the State's Motion to Reconsider in this matter, pursuant to the parties' agreement, to:

Richard Lechich
wapofficemail@washapp.org

William Maurer
wmaurer@ij.org

Andrea Burkhart
andrea@2arrows.net

Mark Kooke
mcooke@aclu-wa.org

Philip Buri
philip@burifunston.com

Antoinette Davis
tdavis@aclu-wa.org

Mark Middaugh
Mark.middaugh@kingcounty.gov

Nancy Talner
talner@aclu-wa.org

3/17/2021 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

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Phone: (509) 477-2873

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